Supreme Court, U. S.
FILED
SEP 2 1975
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-336

CALIFORNIA STATE BOARD OF PHARMACY, et al.,
Appellants,

vs.

SHIRLEY TERRY, individually and on behalf of all others similarly situated, Plaintiff, and ELLEN STERN HARRIS, et al., Plaintiffs in Intervention,
Appellees.

Appeal from the United States District Court for the Northern District of California

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRELIMINIARY STATEMENT

The California State Board of Pharmacy and its members appeal from the judgment of the United States District Court for the Northern District of California which was entered following the decision and opinion of a three-judge panel. The judgment permanently enjoins the Board from enforcing California Business and Professions Code §§ 651, 651.3

and 652.5 insofar as these sections prohibit advertising of the retail price of prescription drugs or advertising of the fact that a quoted price is at a discount. To the extent that these code sections do prohibit such advertising, the three-judge decision held that each of the three designated code sections violated the First Amendment of the United States Constitution. It further held that § 651.3 was unconstitutionally vague and therefore violative of the due process clause of the Fourteenth Amendment.

OPINION BELOW

The opinion of the three-judge panel is set forth in Appendix A hereof. It is reported in 395 F.Supp. 94. The judgment is set forth in Appendix B hereof.

JURISDICTION

This suit was brought in the United States District Court by plaintiff and by plaintiffs in intervention, alleging jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), 28 U.S.C. § 1331 and 28 U.S.C. § 2201, and seeking a declaration that California Business and Professions Code §§ 651, 651.3 and 652.5 were unconstitutional insofar as they prohibited advertising of the retail price of prescription drugs or advertising that a quoted price for such drugs was at a discount. Since an injunction was sought against the enforcement of these code sections, a three-judge court was convened pursuant to 28 U.S.C.

§§ 2281 and 2284. The case was heard on cross motions for summary judgment, and the Court's decision is set forth in its opinion filed on May 12, 1975. The judgment permanently enjoining enforcement of the challenged code sections is dated May 12, 1975, and was entered on May 13, 1975. Notice of Appeal was filed on July 10, 1975 and a copy thereof is attached as Appendix C hereto. This appeal is from the judgment and order of the three-judge court enjoining enforcement of the statutes as indicated, and is taken pursuant to and under the authority of 28 U.S.C. § 1253.

STATUTES INVOLVED

Four California statutes, each of which is contained in the California Business and Professions Code, are substantially involved in this case. Sections 651, 651.3 and 652.5 of that code were declared unconstitutional to the extent that they prohibit advertising of the retail price of prescription drugs, or advertising of the fact that a quoted price is at a discount. Section 4333, also of the Business and Professions Code, is pertinent to any determination of the constitutionality of the other sections in that it requires all pharmacists to post the prices of the 100 most commonly used prescription drugs, and to give price information whenever it is requested of them. The four statutes are herein quoted:[1]

---

[1]Henceforth in this brief these sections of the Business and Professions Code will simply be referred to by number without further identification.

Section 651:

It is unlawful for any person licensed (a) under this division,[2] except a person licensed under Chapter 7.5 (commencing with Section 3300); or (b) under any initiative act referred to in this division to offer for sale or to sell any commodity or to offer to render or to render any service under the representation that the price or fee which is to be, or is, charged for such commodity or service, or both, is at a discount, or under the representation that the price or fee which is to be, or is, charged for such commodity or service, or both, is at a percentage or otherwise less than the average fee or price then regularly charged under like conditions by the person so licensed or by other persons for such commodity or service or commodity and service. The provisions of this section shall not be construed to modify or establish prices or fees or to modify or affect in any manner any other provision of this division. Any person licensed under Chapter 7.5 (commencing with Section 3300) of this division who offers for sale or sells any commodity or offers to render or renders any service under the representation that the price or fee for such commodity or service is at a discount or at a percentage or otherwise less than the average price or fee then regularly charged under like conditions by the person so licensed or by other persons shall include in such representation a statement of the average price or fee then regularly charged by the person so licensed or by other persons.

The provisions of this section pertaining to persons licensed under Chapter 7.5 (commencing

[2]Pharmacists are included within this category.

with Section 3300) of this division shall not apply to the sale of any ophthalmic materials.

Section 651.3:[3]

No person, whether or not licensed under this division, shall advertise or cause or permit to be advertised, any representations in any form which in any manner, whether directly or indirectly, refer to the cost, price, charge, or fee to be paid for any commodity or commodities furnished or any service or services performed by any person licensed as a physician and surgeon, optometrist, pharmacist, or registered dispensing optician, when those commodities or services are furnished in connection with the professional practice or business for which he is licensed; provided, however, that the provisions of this section do not apply to the furnishing of information regarding benefits available, and charges therefor, under the coverage of any hospital or medical service or insurance plan.

This section shall not be construed to do any of the following:

(a) Modify or establish prices or fees or modify or affect in any manner any other provisions of this division.

(b) Prohibit advertising concerning the allowance of credit, time payments, budget terms, or the allowance of any other method of payment for a commodity or a service where the adver-

[3]The following is the text of § 651.3 as it read at the time the complaint herein was filed. Although the section was amended in 1974, the amendments did not change any of the language as it relates to this case. In the Court's Opinion the section is quoted and considered in its pre-amendment form. It is so quoted here.

tising contains no indication of cost, price, charge, or fee.

(c) Prohibit the advertising of any drug or device which does not require a prescription.

Section 652.5:

Any violation of this article constitutes a misdemeanor as to any and all persons, whether or not licensed under this division.

Section 4333:

(a) Notwithstanding any other provision of this code, in every pharmacy there shall be posted on the premises in a place conspicuous to customers a list, provided by the board, of the 100 prescription drugs most frequently sold in this state, and the professional services and nonprofessional convenience services associated with the dispensing of drugs as specified by the board. The list shall be of uniform style and size, no smaller than 17 inches wide by 28 inches high, and shall provide space for the insertion of the retail price charged in the pharmacy for the three quantities most frequently dispensed in this state, as determined by the board, of each of the designated drugs, and provide space for the pharmacy to indicate the professional services and nonprofessional convenience services which are provided or not provided by the pharmacy as part of the retail price charged for the drug. The list shall be completed and posted by every pharmacy in accordance with regulations adopted by the board, and shall be revised annually on dates specified by the board as the board shall direct.

(b) A pharmacist, or his employee, upon request, however, communicated to him, shall give

the current retail price for any drug sold at the pharmacy, including those posted pursuant to subdivision (a).

(c) This section shall not apply to a pharmacy, located in a licensed hospital, which is accessible only to hospital medical staff and personnel.

QUESTIONS PRESENTED

1. In California, where all pharmacists are required by law to post the prices of prescription drugs and to give complete price information whenever it is requested, is a statutory prohibition against advertising of the retail price of prescription drugs, or advertising of the fact that a quoted price is at a discount, unconstitutional under the First Amendment.

2. Do the requirements of due process under the Fourteenth Amendment invalidate the proscriptions against advertising as set forth in § 651.3 of the California Business and Professions Code on the ground that they are unconstitutionally vague.

STATMENT OF THE CASE

This case was initiated by the filing of a complaint on May 23, 1974 in which the plaintiff sought a declaration that § 651.3 was unconstitutional as violative of the First and Fourteenth Amendments. Thereafter a complaint in intervention was filed wherein the plaintiffs in intervention broadened the claim of unconsti-

tutionality to cover §§ 651 and 652.5, as well as § 651.3. It was contended that all of the sections violated the First and Fourteenth Amendments and injunctions against their enforcement were sought.

The case was submitted on cross motions for summary judgment, and on a stipulation duly executed by the parties with respect to certain of the facts. Thus the Court was not called upon to resolve any factual issues.

The three-judge court concluded that the challenged code sections were unconstitutional and enjoined their enforcement insofar as they prohibited advertising of the retail price of prescription drugs, or advertising of the fact that a quoted price was at a discount.

The Court acknowledged that "some commercial speech is subject to a greater degree of regulation than non-commercial speech" (Op. pp. vii-viii), and that "promotional product advertising is less vigorously protected than other forms of speech" (Op. p. xiii). It further recognized that the State has legitimate interests (1) in controlling artificial demand for prescription drugs, (2) in preventing the use of advertising to mislead a customer, (3) in maintaining the standards of the pharmacy profession, and (4) in preventing abuses which could follow from such advertising, including prescription forgery and other kinds of falsification and misuse (Op. p. xxiv).

But the Court failed to sufficiently appreciate (1) that a retailer's sole motivation for advertising is to generate demand and promote sales, (2) that a pharmacy can only be expected to advertise the prices

of a few select drugs, and that the prices of those so selected may very well be misleading as to its price structure generally, (3) that pharmacists must maintain high professional standards by combining a quality service with a responsible price structure, and (4) that the present unauthorized use of prescription drugs obtained through numerous improper channels has become widespread and dangerous.

THE QUESTION IS SUBSTANTIAL

A similar, though by no means identical, question is presented in the appeal in *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al.*, presently pending before this Court in Case No. 74-895. Probable jurisdiction therein was noted on March 17, 1975 (420 U.S. 971). In that case also the question is raised as to whether a prohibition against the advertisement of the price of prescription drugs is unconstitutional.

Commercial speech does not receive the same protection as does noncommercial speech (*Valentine v. Chrestensen*, 316 U.S. 52 (1942)), and the state may validly regulate commercial speech where the state has sufficient legitimate interests to protect (*Breard v. City of Alexandria*, 341 U.S. 622 (1951)). The fundamental constitutional question which is here presented is whether the nature of the state interests which prompted the challenged legislation is sufficient to justify the state in regulating a form of commercial speech, i.e., price and discount advertising of prescription drugs.

Constitutional attacks upon state statutes prohibiting advertising in the health professions have been unsuccessful in this Court on more than one occasion. In *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935), and again in *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955), such statutes were held to be valid exercises of the state's authority to protect public health, safety and welfare.

The California legislature in enacting Business and Professions Code Section 4333 simultaneously enacted a statement of intent and policy, a portion of which reads as follows:

> "It is also the policy of this State recognizing that prescription drugs are designated as such by law because they are potent medications not safe for use except when medically necessary and then only under close professional supervision and control, that information permitted and encouraged by Section 4333 of the Business and Professions Code shall be provided the public only in a manner which will not serve to create artificial demand for prescription drugs."

The concern against the creation of an artificial demand for prescription drugs is not put to rest by the simple observation that these drugs can be dispensed only on the directions of a licensed physician. In this day and age when the use of "uppers" and "downers" has become almost commonplace it would be naive indeed to suggest that sales of certain of these drugs could not be stimulated by advertising them at cut rates, particularly since so many of them are prescribed on a "for use as needed" basis, with

refills authorized but with no way of ascertaining who, in fact, consumed the previous allotment.

Or consider birth control pills. Who would doubt that prescription birth control pills are frequently passed around to numerous users so that an advertisement announcing a big discount on one such drug could promote sales substantially. The same would be true with weight reducing medicines. And certainly it must be recognized that often a person who has found a solution for his ailment through a doctor's prescription will share his find with some friend or relative with an apparent similar affliction. Moreover, where an advertisement shows a substantial savings on sales in larger quantities doctors will be urged to prescribe in those quantities. As the record herein indicates, a doctor is often "pressured" into reluctantly giving a prescription not only in quantity, but even in kind, that is contrary to his better judgment. Other examples of prescription abuses will readily come to mind with little exercise of the imagination.

That price and discount advertising of prescription drugs can, and undoubtedly will, produce an artificial and unhealthy demand for certain of these drugs is therefore simply a fact of life. And the right of a state legislature to enact laws to prevent the creation of these artificial and unhealthy demands should be self-evident. The California legislature has done so in the legislation which is challenged in this case. The action it has taken to stop what could truly become promotional advertising of prescription drugs should not be stricken down.

Nor is a buyer's right to know in any way frustrated by a prohibition against price advertising of these drugs. The legislature has created an effective and meaningful way of enabling consumers to compare the prices at which the various prescription drugs are sold (§ 4333). Each pharmacy is required to post in a conspicuous place "the retail price" of the 100 most used drugs, showing the price charged "for the three quantities most frequently dispensed" and showing also such service (delivery, for example) as is provided by the pharmacy as a part of that retail price. Furthermore, there is the additional strict requirement that "upon request, however communicated" the pharmacy must provide its current retail prices. The consumer's right to know is fully protected, while at the same time the public is protected against the generation of a false demand that can be unhealthy and even dangerous.

The existence of a compelling state interest in the protection of public health was recognized in *Semler* where the Court stated at pages 611-612:

> "The State Court defined the policy of the statute. The Court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The legislature was aiming at 'bait advertising'."

Efforts to equate the health professions with business in general, based upon the fact that the sale of a product may be involved, have met with little success. In *Semler,* for example, the Court stated at page 612:

> "The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with the profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place."

Similarly, in *Williamson* this Court stated at page 490,

> "An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. Therefore, the legislature might conclude that to regulate one effectively it would have to regulate the other."

Yet the Court below concluded (Op. p. xxviii):

> "The pharmacist does nothing more than provide exactly what the doctor ordered. While the pharmacist's function is very important and attendant with great responsibility and risk, it is more akin to the provision of a product than the rendering of a service, which is commonly thought of as involving greater flexibility and discretion on the part of the provider."

Williamson dealt with licensed opticians who had to follow the prescriptions of ophthalmologists and optometrists. Thus dissolves the attempted distinction

drawn by the Court below based upon the fact that the pharmacist follows the doctor's order. *Semler* dealt with the profession of dentistry. In each of these two cases the Court specifically alluded to the fact that the sales of products were involved with the providing of professional health services. To arrive at its decision the Court below simply refused to follow cases flatly controlling here. To fail to follow *Semler* and *Williamson* would require their reversal.

Recognition of pharmacy as a health profession was explicitly expressed by this Court in *North Dakota Pharmacy Board v. Snyder's Stores,* 414 U.S. 156 (1973), where the power of a state to regulate the corporate practice of pharmacy was upheld, the Court acknowledging in the words of Justice Holmes that "(t)he selling of drugs and poisons calls for knowledge in a high degree. . . ." p. 166.

That drugs are highly dangerous chemical substances is fully recognized by federal and state law, 21 U.S.C. 353 and California Business and Professions Code, § 4035. In California the practice of pharmacy is a profession (Business and Professions Code § 4033) and the licensed professional pharmacist must satisfy rigid requirements in terms of formal education, practical experience and passage of a written and practical examination (Business and Professions Code § 4085).

In *Patterson Drug Company v. Kingery,* 305 F. Supp. 821 (1969), a three-judge District Court, in upholding the Virginia statute prohibiting retail prescription price advertising, succinctly stated at 824-825:

> "From the evidence we find that dispensing prescription drugs affects the public health, safety and welfare. And we conclude that the state's classification and regulation of pharmacy as a professional practice is not arbitrary or invidious."

The distinction between commercial advertising and non-commercial speech, first announced in *Valentine v. Chrestensen,* supra, still flows in its progeny. See *Capitol Broadcasting Co. v. Kleindienst,* 405 U.S. 1000 (1972), aff'g 333 F.Supp. 582 (DC 1971), where the constitutionality of a statute prohibiting electronic media from carrying cigarette advertisements was affirmed; and *Pittsburgh Press Co. v. Human Relations Commission,* 413 U.S. 376 (1973) where a prohibition against newspapers carrying help-wanted advertisements in sex-designated columns was approved as constitutional.

This Court must decide to what extent the public good may be served by legitimizing and imprinting on any mind capable of hearing, reading and perceiving the cut-rate availability of dangerous drugs. Can the "right to know" in such a context be reconciled with the perils inherent in such exposure.

Furthermore, the fundamental fallacy in the Court's opinion is its assumption that media advertising is "the most effective means of providing price information to consumers." (Op. p. xx). The Court appears to accept that proposition almost as a starting premise upon which its decision is built. In the first place, it cannot be gainsaid that the ultimate aim of

the advertiser is to make his product not a choice but a necessity. To achieve its goal and to bear its cost, advertising must stimulate sales, increase demand and thus induce "stocking up." We must therefore ask, is this a desirable direction and should it be encouraged and accelerated in an already drug-oriented society by granting it First Amendment insulation?

In the second place, the Court's statement is totally inaccurate as related to prescription drugs. There are a great variety of prescription drugs. An extremely small percentage of these are known by name to the general public. Section 4333 requires the posting of the prices of the 100 most commonly used drugs. But if a pharmacy is going to advertise prescription drugs, it will obviously cover only a few of these. Most likely the few such drugs so advertised will not be representative of drug prices generally. The "loss leader" or the low-priced product is the one that is advertised. A pharmacy will seek customers by advertising the prices of drugs which it can sell at a generally lower rate than the numerous other drugs not mentioned in the ad. A buyer's ability to compare will not be aided. Pharmacy No. 1 will advertise the prices of drugs A, B and C. Pharmacy No. 2 will advertise the prices of drugs D, E and F. Other pharmacies will not advertise at all. Any attempt to make comparisons through the advertisements will be futile. But comparisons can be made by examination of the posted prices in the pharmacies themselves and by telephone calls. Thus, the statement that media advertising is "the most effective means of providing price information to consumers" is simply not accurate with reference to prescription drugs within the framework of

California law. The "most effective means" is through utilization of the sources of such information which are required by law to be made available.

Although this Court has, as recently as June of this year, reiterated the proposition "that commercial advertising enjoys a degree of First Amendment protection" (*Bigelow v. Commonwealth of Virginia*, ... U.S. ....., 95 S.Ct. 2222 (1975)), the Court specifically noted that it was unnecessary to decide "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." In Footnote 10 the Court points to numerous cases where there "existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating" and comments that its decision is not inconsistent with the regulation of advertising in those cases. Certainly California legitimately regulates the pharmacy profession and the sale of prescription drugs. Prohibiting the advertisement, even of the prices, of such drugs promotes the very important state objective of avoiding an accelerated and unhealthy demand for those drugs.

A second constitutional question is presented in this case. The Court below found § 651.3 unconstitutionally vague, in that it is unclear as to what types of information-distribution are prohibited by the prohibition against advertising and as to which persons are prevented from advertising. Much ink was spilled and discourse devoted to characterization of "advertisements" as "promotional" or "non-promotional," "com-

mercial" or "non-commercial," and appellants were accused of a "radical turnabout" in their interpretation of § 651.3. But, as the affidavit of James R. Gates, president of appellant Board, appended to defendants' Response to Motion for Summary Judgment, clearly points out, the State Board of Pharmacy's interpretation has never altered since the statute was enacted. As interpreted and applied, the statute prohibits only *promotional advertising* as opposed to the informational distribution of prescription drug price lists. Particularly since it has been so interpreted and applied, the statute is not vague (*Gooding v. Wilson,* 405 U.S. 518 (1972)).

Moreover, the Pharmacy Board and its members are the only defendants in this action and thus the only parties before the Court against whom the injunction can be applicable. But the Pharmacy Board only has jurisdiction over the activities of licentiates, and, indirectly, over the activities of agents of licentiates by virtue of the authority over their principals. Thus, insofar as the parties before the Court are concerned, the statute cannot, in any event, apply to non-licentiates distributing informational price lists.

In the context of the statute as a whole, a very strained interpretation is required to include the distribution of informational price lists by non-licentiates within the prohibitions of the code section. The key word, which the lower Court concluded created the alleged vagueness, was "advertise." If that word is vague with respect to the advertising of prescription drug prices, it is likewise vague with respect to

its application to all of the other numerous activities encompassed by § 651.3. It would follow that the prohibition against advertisement of services performed or commodities furnished by any of the numerous professional people therein named would likewise fall because of unconstitutional vagueness. In other words, the consequence of the vagueness holding could be extremely far-reaching, and extend to the activities of a large group of professional people far beyond the much narrower restrictions established by the lower Court's injunction.

But it is not vague. "No person, . . . shall advertise" must be taken to mean the solicitation of a commercial transaction. Advertising is defined in the statute itself as "representations" which refer to the "cost, price, charge, or fee to be paid." The intent is clear that the legislature determined that the health professions named had no business selling and marketing their commodities and services by means of commercial solicitation, whether by the professional directly or through some agent or intermediary indirectly. Certainly the statute does not have to be "grammatically tortured" (Op. pp. xxvi-xxvii) to reach this conclusion. To determine whether persons of common intelligence must guess at which action is prohibited, the entire text of the statute or the subjects dealt with may furnish an adequate standard (*Winters v. New York,* 333 U.S. 507 (1948)). The California Legislature under § 4333 requires information on drug prices to be given to the public in a non-distortive and non-promotional fashion. Obviously the "advertising" prohibited by § 651.3 is commercial solicitation. The

statutory context and the common understanding of the words in question convey with adequate clarity what is forbidden (*Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Kovacs v. Cooper,* 336 U.S. 77, reh. den. 336 U.S. 921 (1949)). Informational Publications by public interest groups weren't ever intended to be prohibited.

The lower court discussed, but did not pass on, the issue of vagueness as it related to § 651. That section, which prohibits representations, by persons in certain professions, that an offered fee is at a discount, is analogous in several particulars to § 651.3. It is significant that a California appellate court has held that § 651 is not unconstitutionally vague (*Cozad v. Board of Chiropractic Examiners,* 153 C.A.2d 249, 258-259 (1957)).

In its ruling on the constitutionality of § 651.3 the lower court restricted its holding of unconstitutionality to a very limited area, i.e., "insofar as (it) prohibit(s) advertising of the retail price of prescription drugs or advertising of the fact that a quoted price is at a discount." As previously indicated, we urge most strongly that the statute only prohibits promotional advertising by a licentiate or his agent, and the defendant Board has consistently so construed it. But if, as the Court suggests, the statute can be read as prohibiting purely informational publications then we suggest that the finding of unconstitutionality should have been limited to that type of activity. Had the Court found the statute unconstitutional only insofar as it prohibited informational publications by non-licentiates (if, in fact, there is such a prohibition),

no objection whatsoever would have been heard from the Pharmacy Board, nor in all probability from anyone else. For neither the Pharmacy Board, nor any of the other Boards so far as we know, has ever treated the statute as containing any such prohibition.

What the statute is concerned with, and what the Board is concerned with, is "advertising", a term which signifies promotion for sale. Its commonplace meaning envisions "emphasizing desirable qualities so as to arouse a desire to buy or patronize" (Webster's Dictionary). It almost goes without saying that the only reason a drug store would advertise the price of a prescription drug would be to emphasize its low price and thereby stimulate its sale.

CONCLUSION

It is respectfully submitted that the questions presented by this appeal are substantial, requiring plenary consideration, and that probable jurisdiction should be noted.

Dated, Sacramento, California
August 25, 1975.

JOHN F. DOWNEY,
RICHARD D. WAUGH,
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DOWNEY, BRAND, SEYMOUR & ROHWER,
Of Counsel.

(Appendices "A", "B" and "C" Follow)

APPENDICES

Appendix "A"

In the United States District Court
Northern District of California

No. C-74-1091 RFP (SJ)

Shirley Terry, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

California State Board of Pharmacy, William E. McDermont, Jr., James R. Gates, Denver C. Latimer, Rosece C. Carroll, Charles V. Cummins, David H. Garfield, Kenneth G. Gonsalves, and Carl L. Vitalie, as members of the State Board of Pharmacy,

Defendants,

Ellen Stern Harris; The California Newspaper Publishers Association, a California nonprofit corporation; The California Broadcasters Association, a California nonprofit corporation; The Los Angeles County Health Rights Organization, an unincorporated nonprofit association; Committee for the Rights of the Disabled, a California nonprofit corporation; The San Francisco Consumer Action Council, a California nonprofit corporation; The California Legislative Council for Older Americans, an unincorporated nonprofit association; The Blind and Disabled Action Committee of California, an unincorporated nonprofit association,

Plaintiffs in Intervention.

[Filed May 12, 1975]

Opinion

Before: Browning, Circuit Judge, East, Senior District Judge, and Peckham, District Judge

Peckham, District Judge

Plaintiffs and plaintiffs in intervention seek declarations of unconstitutionality and permanent injunctions against the enforcement of California Business and Professions Code Sections 651, 651.3 and 652.5 insofar as they prohibit media advertising of the retail price of prescription drugs.

The cause of action arises under 42 U.S.C. Section 1983, with jurisdiction conferred upon this court by 28 U.S.C. Section 1343(3). Since a permanent injunction is sought against the enforcement of these state statutes, a three-judge court has been convened pursuant to 28 U.S.C. Sections 2281 and 2284.

The named plaintiff, Shirley Terry, is a recipient of public assistance whose physician has prescribed certain maintenance drugs which she will be required to take for the rest of her life. She sues individually and on behalf of the class of persons who regularly purchase prescription drugs and wish to receive price information about these drugs from advertising.

Defendants are the California State Board of Pharmacy and the individual members of that board who are responsible for the regulation of the practice of pharmacy in California.

Plaintiffs in intervention are Ellen Stern Harris, the California Newspaper Publishers Association, the

California Broadcasters Association, the Los Angeles County Health Rights Organization, the Committee for the Rights of the Disabled, the San Francisco Consumer Action Council, the California Legislative Council for Older Americans, and the Disabled and Blind Action Committee of California.

I. ABSTENTION

Plaintiff's attack the constitutionality of these statutes on several grounds. Before reaching the merits, however, this court must dispose of defendants' suggestion that we abstain from deciding the case until the issues have been presented to the California state courts for resolution. Abstention in this type of case is proper where the state law challenged is uncertain. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965). If the meaning of the statutes was unclear and the federal constitutional question presented would be materially altered or could be avoided by state court construction of the statutes, abstention might be appropriate. *Lake Carriers Association v. MacMullan*, 406 U.S. 498, 510 (1972); *Harrison v. NAACP*, 360 U.S. 167 (1959).

In the present case, the precise scope of the class of persons who are prevented from advertising by the statutes is in dispute. It is clearly the intention of the statutes, however, to prohibit at least some persons from disseminating retail drug price information. Therefore, the federal constitutional question could only be avoided if the California courts either construed the statutes not to apply to anyone, a view not

sustainable by the statutory language, or if they declared the statutes unconstitutional themselves. It is clear that we need not abstain when the only reason to do so would be to permit the California courts to have the first opportunity to assess the constitutionality of these statutes. State judicial remedies need not be exhausted under the federal civil rights acts. *Lane v. Wilson*, 307 U.S. 268 (1939); *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974). The contribution of federal courts to the development of constitutional law would be severely restricted by a doctrine that required deference to the state courts each time a case was presented in which both the state and federal courts had the jurisdiction and duty to examine the constitutionality of state legislation. Abstention is particularly inappropriate when the statutes are challenged on First Amendment grounds. *See Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Zwickler v. Koota*, 390 U.S. 611 (1967). Accordingly, this court will proceed to the merits.

II. SECTION 651.3 — FIRST AMENDMENT

California Business and Professions Code Section 651.3 provides:

> No person, whether or not licensed under this division, shall advertise or cause or permit to be advertised, any representations in any form which in any manner, whether directly or indirectly, refer to the cost, price, charge, or fee to be paid for any commodity or commodities furnished or any service or services performed by any person licensed as a physician and surgeon, optometrist, pharmacist, or registered dispensing optician, when those commodities or services are furnished in connection with the professional practice or business for which he is licensed; provided, however, that the provisions of this section do not apply to the furnishing of information regarding benefits available, and charges therefor, under the coverage of any hospital or medical service or insurance plan.
>
> The section shall not be construed to do any of the following:
>
> (a) Modify or establish prices or fees or modify or affect in any manner any other provisions of this division;
>
> (b) Prohibit advertising concerning the allowance of credit, time payments, budget terms, or the allowance of any other method of payment for a commodity or a service where the advertising contains no indication of cost, price, charge, or fee;
>
> (c) Prohibit the advertising of any drug or device which does not require a prescription.[1]

Plaintiffs contend that Section 651.3 violates their First Amendment right as consumers of prescription drugs to receive information concerning the price pharmacies charge for prescription drugs. The parties have stipulated that information as to the price which

[1] California Business and Professions Code § 652.5 makes violation of § 651.3 a misdemeanor.

A misdemeanor is punishable by imprisonment for not more than six months or a fine not to exceed $500 or both. California Penal Code § 19. An agreement or conspiracy to commit a misdemeanor is punishable as a felony. California Penal Code § 182.

pharmacies charge for prescription drugs is health essential in that it can allow persons on limited income to purchase necessary prescription drugs at the lowest possible price; that wide disparities in price are found among competing pharmacies; that without information on lowest possible drug price, persons such as plaintiff Terry purchasing the drugs at higher prices will have to sacrifice some other necessities; that to senior citizens, in particular, who have a per capita expenditure for prescription drugs four times greater than that of persons under 65, said information is essential.

This same First Amendment claim was recently upheld in *Virginia Citizens Consumer Council v. State Board of Pharmacy*, 373 F.Supp. 683 (E.D.Va. 1974) (three-judge court), *prob. juris. noted*, ... U.S. ....., (3/17/75), 43 U.S.L.W. 3499. There, a three-judge court permanently enjoined the enforcement of a Virginia statute that labeled as "unprofessional conduct" the advertising or discounting by pharmacies of the prices of retail prescription drugs.

The freedoms of speech and the press contained in the First Amendment are fundamental rights which are safeguarded against infringement by the states through the due process clause of the Fourteenth Amendment. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937). It is also clear that the First Amendment protects the hearer of the speech and the reader of the article fully as much as it protects the speaker and the author. *Kleindienst v. Mandel*, 408 U.S. 753, 762-64 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

A. Inapplicability of Commercial Speech Exception to First Amendment.

The precise information which the plaintiffs claim a right to receive is the price of prescription drugs, the dissemination of which is prohibited by the challenged statutes. Defendants, relying heavily on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), contend that the distribution of this information is properly labeled advertising which, as commercial speech, should not be entitled to First Amendment protection. It is perhaps appropriate here to state carefully again exactly what is at issue in this case. The plaintiffs seek an injunction against the enforcement of these statutes only insofar as they prohibit price advertising. The plaintiffs are not asserting a right to receive information concerning the quality, effectiveness or capabilities of the drugs, information which tends more directly to promote the product. Thus, the narrow issue before this court is whether low-income consumers of prescription drugs are entitled under the First Amendment to receive information consisting of the retail price at which pharmacies sell prescription drugs.

It is clear that speech is not rendered commercial and stripped of First Amendment protection by the mere fact that it relates to an advertisement. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 384, rehearing denied, 414 U.S. 881 (1973); *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964). But it is equally clear that some commercial speech is subject to a greater degree of

regulation than noncommercial speech. *Valentine v. Chrestensen, supra; Pittsburgh Press supra.*

In 1942 in *Valentine v. Chrestensen,* the Supreme Court sustained a city ordinance which had been interpreted to ban the distribution by handbill of an advertisement soliciting customers to pay admission to tour a submarine. The following language from the short unanimous opinion originated the so-called "commercial speech" doctrine:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[2]

Since 1942, the doctrine has had a somewhat confusing development in the Supreme Court,[3] prompting one of the judges on the unanimous *Chrestensen* court subsequently to urge reconsideration of the distinction between commercial and noncommercial speech, noting that the ruling in *Chrestensen* was

[2]*Valentine v. Chrestensen, supra,* 316 U.S. at 54.

[3]*See, e.g., Jones v. Opelika,* 316 U.S. 584, 597 (1942); *Jamison v. Texas,* 518 U.S. 413, 417 (1943); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Breard v. Alexandria,* 314 U.S. 622 (1951); *Cammarano v. United States,* 358 U.S. 498 (1959); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

"casual, almost offhand . . . [a]nd . . . has not survived reflection."[4]

The most recent Supreme Court opinion discussing the commercial speech doctrine was *Pittsburgh Press Co. v. Pittsburgh Commission on Human relations, supra,* 413 U.S. 376 (1973). A Pittsburgh city ordinance proscribed an employer from discriminating on the basis of sex in employment advertising and further forbade any person from assisting in such discrimination. The Pittsburgh Human Relations Commission charged the newspaper with a violation of the ordinance in maintaining separate male and female columns in its help-wanted advertising and ordered the newspaper to cease and desist from segregating the advertisement. The Supreme Court affirmed the Commission order as modified by the Commonwealth Court of Pennsylvania.[5]

While it is undeniable that *Pittsburgh Press* reaffirmed in certain respects the *Chrestensen* doctrine by recognizing the distinctions between commercial and noncommercial speech, *Pittsburgh Press* is distinguishable from the present case and does not compel this court to uphold the challenged statutes.

1. *Reliance on Illegality.* The opinion of the court in *Pittsburgh Press* relies heavily on the fact that the advertising prohibited by the Commission

[4]*Cammarano v. United States,* 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

[5]4 Pa. Commw. 448, 287 A.2d 161 (1972).

order encouraged an *illegal*[6] activity, employment discrimination. In response to the publisher's invitation to the court to abandon the *Chrestensen* doctrine, the court indicated that it was not necessary in *Pittsburgh Press*, intimating that it might be appropriate in a situation not involving illegal activity.

> Pittsburgh Press goes on to argue that if this package of advertisement and placement is commercial speech, then commercial speech should be accorded a higher level of protection than *Chrestensen* and its progeny would suggest. Insisting that the exchange of information is as important in the commercial realm as in any other, the newspaper here would have us abrogate the distinction between commercial and other speech.
>
> Whatever the merits of this situation may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a

[6]The result reached in *Holiday Magic, Inc. et al. v. Warren et al.*, 357 F. Supp. 20 (E.D. Wis. 1973), may be similarly explained. Plaintiffs challenged an order of the Wisconsin Department of Agriculture which prohibited the promotion of a chain distributor or pyramid scheme. After an informative review of the cases and secondary authority on the commercial speech exception to the First Amendment, 357 F. Supp. at 24-26, the court upheld the order against a First Amendment attack. The analysis relied heavily on the fact that what was prohibited was speech intended to solicit the immediate financial participation of persons in these *unlawful* commercial activities. See *Holiday Magic, supra*, 357 F. Supp. at 26.

In *Barrick Realty Inc. v. Gary*, 491 F.2d 161 (7th Cir. 1974), *affirming* 354 F. Supp. 126 (N.D. Ind. 1973), a city ordinance forbidding use of for sale signs in residential areas was upheld against a First Amendment attack. The court there also appeared to be particularly responsive to the history, which indicated that the prohibition was intended to slow down the pace of resegregation that had been encouraged by realtors using *unlawful* blockbusting techniques.

> newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in nonexempt employment has been declared illegal under Section 8(a) of the Ordinance, a provision not challenged here. And Section 8(e) of the Ordinance forbids any employer, employment agency, or labor union to publish or cause to be published any advertisement "indicating" sex discrimination. This, too, is unchallenged. Moreover, the Commission specifically concluded that it is an unlawful employment practice for an advertiser to cause an employment advertisement to be published in a sex-designated column.
>
> Section 8(j) of the Ordinance, the only provision which Pittsburgh Press was found to have violated and the only provision under attack here, makes it unlawful for "any person . . . to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance." The Commission and the courts below concluded that the practice of placing want ads for nonexempt employment in sex-designated columns did indeed "aid" employers to indicate illegal sex preferences. The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in

> their hiring decisions. Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.[7]

The information which plaintiffs seek to receive in this case, the retail price of prescription drugs, does not promote illegal activities. Rather, it is highly significant data that can facilitate the purchase of medically necessary drugs by persons who might not otherwise be able to afford them. Insofar as the result reached in *Pittsburgh Press* depends on the illegality of the interests served by the speech there found not to be entitled to First Amendment protection, the commercial speech doctrine applied in that case is not determinative of the constitutional attack on these statutes.[8]

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[7] *Pittsburgh Press, supra,* 413 U.S. at 388-89. (Footnote omitted.)

[8] For a similar reason, cases such as *American Medicinal Products, Inc., et al. v. Federal Trade Commission,* 136 F.2d 426 (9th Cir. 1943) and *E. F. Drew & Co. v. Federal Trade Commission,* 235 F.2d 735, 740 (2nd Cir. 1956), *cert. denied,* 352 U.S. 969 (1957) do not compel this court to uphold the challenged statutes. *American Medicinal Products* upheld an order of the Federal Trade Commission directing a drug manufacturer to cease and desist from advertising drugs found by the Commission to be *dangerous* and *fraudulently promoted; E. F. Drew* held that there was no constitutional right to disseminate *false* or *misleading* advertisements. This court does not intend by its decision to cast any doubt on this line of authority, which resisted First Amendment attacks on governmental proscriptions against *fraudulent* advertising.

2. *Product Promotion.* The present dispute is also distinguishable from cases in which merchandisers were seeking First Amendment protection for nothing more than expressions designed to promote the sale of a product. *Valentine v. Chrestensen* involved handbills distributed by an enterprising promoter to previously uninterested members of the public to induce them to tour his submarine for a fee. The court in *Pittsburgh Press* stated that, "[t]he critical feature of the advertisement in *Valentine v. Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine."[9]

It is undisputed that promotional product advertising is less vigorously protected than other forms of speech. *Capital Broadcasting Co. v. Mitchell,* 333 F.Supp. 582 (D.D.C. 1971) (three-judge court), affirmed without opinion, 405 U.S. 1000 (1972); *Banzhaf v. FCC,* 132 U.S.App.D.C. 14, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969) (recognizing rule). *Banzhaf* upheld the FCC requirement that broadcasters who carry cigarette advertising also provide a significant amount of time for presentation of anticigarette messages, while *Capital Broadcasting* upheld the legislative ban on cigarette advertising in the electronic media. In response to the First Amendment attack, the *Banzhaf* court stated:

> The speech which might conceivably be "chilled" by this ruling barely qualifies as constitutionally protected "speech." It is established

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[9] *Pittsburgh Press, supra,* 413 U.S. at 385.

> that some utterances fall outside the pale of First Amendment concern. Many cases indicate that product advertising is at least less rigorously protected than other forms of speech. Promoting the sale of a product is not ordinarily associated with any of the interests the First Amendment seeks to protect. As a rule, it does not affect the political process, does not contribute to the exchange of ideas, does not provide information on matters of public importance, and is not, except perhaps for the ad-men, a form of individual self-expression. It is rather a form of merchandising subject to limitation for public purposes like other business practices.[10]

The instant action seeks access to the retail prices of prescription drugs. While this information is commercial in that it consists of data upon which a consumer may base a decision to purchase, it is not promotional in the same sense as the advertising of cigarettes or submarine tours. Prescription drugs may only be purchased when medically necessary. The consumer does not freely choose to buy the product; he is directed to do so by his physician. The information sought here will make it more likely that plaintiffs will be able to purchase these health essential items. The promotional advertising of cigarettes and submarine tours seeks to generate new demand for goods by consumers who had expressed no previous interest in the products. By touting the virtues of the product, the advertising is intended to create a commercial transaction that would not otherwise occur. Insofar as

[10] *Banzhaf v. FCC, supra,* 405 F.2d at 1101-02. (Footnotes omitted.)

the information sought here will create commercial transactions that would not otherwise occur, the health needs of the society are served, since a physician has already determined that the prescription drug, the product purchased, is medically necessary to the well-being of the consumer-patient. Further, the advertising sought here is limited to price and does not extend to promotional gimmicks extolling the product and generating artificial demand. While the distinction is admittedly a fine one, this court is of the opinion that since the "critical feature" of the unprotected commercial speech in *Chrestensen* was that it "did no more than propose a commercial transaction," and the information sought here does more, *Chrestensen* and the related opinions in *Banzhaf* and *Capital Broadcasting* do not compel this court to uphold the challenged statutes.

3. *Balancing Approach.* There is also support in the case law for an approach that is not limited to a rigid two-tier typology separating the limited category of unprotected commercial speech from normal constitutionally protected speech. By its reliance on the illegality of the advertisements in sustaining the ordinance in *Pittsburgh Press,* the court invited a balancing of interests approach by implying that even the advertising of an "ordinary commercial proposal" could be accorded protection when the "First Amendment interest which might be served" "might arguably outweigh the governmental interest supporting the regulation."[11]

[11] *Pittsburgh Press, supra,* 413 U.S. at 389.

Rowan v. United States Post Office Department, 300 F.Supp. 1036 (C.D.Cal. 1969) (three-judge court), *affirmed*, 397 U.S. 728 (1970), rejected a constitutional challenge to a statute permitting addressees to restrict the mailing to them of unsolicited erotic material. Judge Hufstedler, concurring specially in *Rowan*, set out a fluid approach to the analysis of commercial speech issues:

> The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. "Purely commercial advertising" has never received the same kind of constitutional protection as that afforded to expressions of greater public concern. The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales.[12]

After balancing the various interests advanced, with particular emphasis on the "peculiar quality of offensiveness which adheres to solicitations appealing to the erotic interest,"[13] Judge Hufstedler concluded that the public interest was sufficient to sustain the statute against First Amendment attack.

In another case utilizing the balancing approach to commercial speech questions, *Unemployed Workers Union v. Hackett*, 332 F.Supp. 1372, 1376 (D.R.I. 1971) (Pettine, C.J.), the court concluded after weighing the various interests that it was a "thoughtless

[12] *Rowan, supra*, 300 F. Supp. at 1044 (Hufstedler, J., concurring specially).

[13] *Id.*

perversion" to suggest that a handbill informing unemployed persons about food stamp and welfare benefits, as well as about unemployment compensation, was unprotected as commercial speech simply because it was designed to assist the plaintiff Unemployed Workers Union in organizing others for its cause.

In weighing the importance of the speech being expressed against the interests advanced by the state in the present case, we begin by observing that the information sought by the plaintiffs, simply the price charged for a given quantity of a given prescription drug, has been stipulated to be health-essential, and may in some cases even be life-essential, insofar as it may increase availability to low-income persons of medically necessary prescription drugs. Plaintiffs do not desire to receive advertising about the quality, desirability of effectivness of the product, but merely price information on prescription drugs, items which are subject to extremely stringent sale and distribution controls. Plaintiff consumers have indicated a desire to receive this information, which is vital to their health and welfare. *Valentine v. Christensen, supra*, involved nonvital, purely commercial, promotional literature regarding the amusement of a submarine tour, information which the recipients of the handbills never indicated a wish to receive. *Pittsburgh Press, supra*, involved speech which was not simply informative, but which was found by the Pittsburgh Commission on Human Relations to assist unlawful sex-based employment discrimination. The interests of the parties seeking First Amendment protection in this case

are substantially more compelling than in *Chrestensen* and *Pittsburgh Press*, and the interests advanced by the state are less compelling, as discussed *infra*.

In the course of distinguishing *Chrestensen*, the three-judge court stated in the *Virginia Citizens Consumer Council* case:

> Instantly, the actual suitors are consumers: their concern is fundamentally deeper than a trade consideration. While it touches commerce closely, the overriding worry is the hindrance to a means for preserving health or even saving life.[14]

It has already been established that the mere fact that speech touches commerce does not necessarily deprive it of constitutional protection. In determining the extent to which the advertisements plaintiffs seek to receive are commercial or informational, the following language of the Supreme Court gives us direction.

> Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period.

Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

In light of the vital importance of the speech here proscribed, this court is of the opinion that the information which plaintiffs claim a right to receive,

[14] *Virginia Citizens Consumer Council*, *supra*, 373 F. Supp. at 686.

the retail price of prescription drugs, is entitled to the protection of the First Amendment.[15]

B. *Insufficiency of Available Alternative Means of Access.*

This preliminary holding, however, is by no means alone dispositive of the constitutionality of the challenged statutes. Defendants contend that plaintiffs' First Amendment right-to-know argument is undercut by the presence of alternative means of obtaining the price information, pursuant to California Business and Professions Code Section 4333, which requires pharmacists to post inside their stores the prices of the 100 most frequently used drugs and answer oral and written inquiries about prices.

The availability of other alternatives certainly does not extinguish the constitutional interest of plaintiffs in the particular form of access sought. *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972). In other contexts, the court has indicated that the availability of alternative forums for the expression and presumably the receipt of information is wholly irrelevant to a constitutional demand for another reasonable method.

[15] Two California Courts of Appeal have held that the First Amendment protects the right to disseminate information to the public concerning legal drugs and treatment regimens. *People v. Orser*, 31 C.A.3d 528, 107 Cal. Rptr. 458 (1st Dist. 1973) (information and counseling about legal therapeutic abortions); *In re Schillaci*, 196 C.A.2d 591, 16 Cal. Rptr. 757 (2nd Dist. 1961) (information concerning remedies for certain sexual inadequacies and disorders). While these cases are, of course, not binding upon this court, the discussion of the importance of the health-related information the public there sought to receive and the analysis of the First Amendment issue are consistent with and provide persuasive support for the conclusion reached in the present case.

Schneider v. Irvington, 308 U.S. 147, 163 (1939). In some cases, most notably those involving penal incarceration, the court has permitted the withdrawal or limitation of certain constitutional rights and privileges as concomitants to the loss of liberty. *See, e.g., Pell v. Procunier*, 417 U.S. 817 (1974). But even in *Pell* the court reaffirmed the general rule in non-unique contexts that alternative sources of information do not foreclose First Amendment inquiry.

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public.[16]

Many of the plaintiffs, users of prescription drugs, are old and infirm, unable to travel to and view posted price posters at a number of pharmacies sufficiently large to provide them with an accurate sample of prices. Evidence in this case indicates that telephone contact is also very time-consuming and costly and not a feasible means of making price information available to an individual consumer. This court finds that by prohibiting media advertising, the most effective means of providing price information to consumers, the challenged statutory scheme significantly and impermissibly restricts the distribution of the information plaintiffs seek, thereby establishing a prima facie violation of the First Amendment.

[16] *Pell, supra*, 417 U.S. at 825.

C. *State Interests.*

In defense of this restriction on plaintiffs' access to information, the Board of Pharmacy contends that the statute serves a number of legitimate state interests. Before examining these interests, a framework for analysis must be established. In order to withstand attack grounded in the First Amendment, one of our preferred freedoms,[17] the state interests served by the statute must be compelling. *Branzburg v. Hayes*, 408 U.S. 665, 680 (1972). In addition, even if the statute is shown to serve compelling governmental interests, to be upheld there must be no means of advancing those interests available to the state which are less burdensome to the freedoms impinged upon by the legislation. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Essentially four reasons are urged by defendants as compelling support for the maintenance of California's current prohibition on price advertising: (1) price advertising would generate artificial demand for prescription drugs; (2) price advertising would be misleading to consumers; (3) price advertising would make certain information available to potential forgers of prescriptions; and (4) price advertising would tend to lower the standards of the profession of pharmacy. Plaintiffs have responded directly to each of the state claims.

Initially, defendants argue that California has a compelling interest in seeing that price information

[17] *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

on drugs is provided to the public in a manner which will not serve to create artificial demands for prescription drugs. Consumers do not, however, determine the demand for prescription drugs as they do for over-the-counter drugs. The consumer performs only one function in the process, that of purchasing the product selected for him by his physician and sold to him by his pharmacist. Only properly licensed health practitioners may issue a prescription; dangerous drugs may only be dispensed by prescription; the sale of dangerous drugs without a prescription is prohibited by law; the pharmacist who violates the law can lose his license to practice; and the physician who engages in improper prescribing practices can be subjected to disciplinary action by the Board of Medical Examiners. In *Pennsylvania State Board of Pharmacy v. Pastor*, 441 Pa. 186, 272 A.2d 487 (1971), the Supreme Court of Pennsylvania stated:

> "[T]o urge that allowing price advertisements of prescription drugs would increase the use of such drugs, one must assume either (a) that patients are able to pressure doctors into prescribing drugs for them, or (b) that pharmacists are willing to risk selling such drugs without a prescription.[18]

In the course of declaring unconstitutional a pharmacy board rule prohibiting price advertising of prescription drugs, the Supreme Court of Florida stated in *Stadnick v. Shell's City, Inc.*, Fla., 140 So. 2d 871 (1962):

[18] *Pennsylvania State Board of Pharmacy v. Pastor, supra*, 272 A.2d at 492.

> The rule proceeds on the notion that the advertisement of a prescription drug will subject the physicians to some sort of irresistible pressures that will force them to prescribe drugs for their patients simply on the basis of patient demand and without regard to the physical well-being of the patient. This concept disregards completely the professional and ethical integrity of the medical profession in prescribing remedies for patients. Furthermore, it actually suggests the probability of unethical conduct.[19]

This court simply will not make those assumptions about the practices of pharmacists and physicians.

It is clear that advertising limited to price, like the simple and clear posting of prices required by Section 4333 of the California Business and Professions Code, need not be deceptive. Furthermore, false advertising is already proscribed by state law.

The interest of the state in preventing forgery of prescriptions is substantial, perhaps even compelling, but the statutory scheme presently challenged is a very indirect method of combating the problem.

Price advertising need not reduce the professional standards of pharmacists. With prescription drug price advertising permitted, pharmacists will be as free as they are now to advise purchasers on the proper use of drugs which doctors prescribe and to monitor the interaction of the various drugs a person may be ingesting on the prescription of more than one physician. The ruling of this court will not com-

[19] *Stadnick v. Shell's City, Inc., supra*, 140 So.2d at 875.

pel any pharmacist to lower the level of his professional practice.

It is clear that the state has legitimate interests in controlling artificial demand for prescription drugs, preventing misleading advertising, maintaining professional standards and preventing forgery of prescriptions. Even assuming that this court found them to be compelling, the statute challenged could not stand because the statute only minimally advances the interests asserted, and in any event even does not do so by the means least restrictive of the plaintiff's burdened First Amendment freedoms. Each asserted state interest can be more directly protected without restricting access to information on prescription drug prices. If present enforcement practices are inadequate, stiffer penalties and more vigorous enforcement of existing law will insure that physicians or pharmacists will not succumb to patient pressure to prescribe or dispense unnecessary medication. The maintenance of professional standards can more effectively be accomplished by direct supervision and monitoring of the services pharmacists provide to their patients. Forgery and deceptive advertising can, of course, be fought by the vigorous enforcement of already existing prohibitory legislation.

Accordingly, this court holds that to the extent the challenged statutory scheme prohibits advertising limited to the price charged for prescription drugs, it violates the First Amendment rights of the plaintiffs.

III. SECTION 651.3—DUE PROCESS VAGUENESS

Plaintiffs also challenge Section 651.3 on due process grounds, contending that the statute is unconstitutionally vague in two respects: first, that it is unclear what types of information-distribution are prohibited by the proscription against "advertising" and second, that it is unclear what persons are prevented from "advertising" by the statutes.

Defendants initially contended that Section 651.3 prohibited the publishing by "any person" of "any representations in any form which in any manner, whether directly or indirectly, refer to cost, price, charge, or fee," that is, it prevented anyone, including the plaintiff consumer groups, from advertising in any manner other than the posting of prices provided for in California Business and Professions Code Section 4333.[20] Later, defendants retreated to a more limited position, contending that Section 651.3 only prohibits promotional, not informational, advertising, so that, for example, plaintiff San Francisco Consumer Action would not be prevented from publishing noncommercial, informative pamphlets.[21]

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[20] *See* defendants' opening memorandum of points and authorities in support of motion to dismiss or in the alternative motion for summary judgment and opposition to injunctive relief, Docket No. 20, filed December 12, 1974, at 21-24.

[21] *See* defendants' response to motion for summary judgment of plaintiffs and plaintiffs in intervention, Docket No. 23, filed December 27, 1974, at 2-4, and the affidavit of James R. Gates, defendants' Exhibit H, which states that the defendant California State Board of Pharmacy only seeks to enforce the statute against individuals who seek to promote the sale of prescription drugs by advertising.

The defendants' position is, perhaps, most easily understood by examining four conceivable proscriptions against drug price advertising, depending on two variables: first, the nature of the advertising (informational or promotional), and second, the person doing the advertising (licensed pharmacist or other person). Defendants' initial position was that the statute had the broadest possible scope, covering all four possibilities, preventing all advertising, informational as well as promotional, by any persons. The position defendants later adopted would clearly permit *informational* advertising by *nonlicentiates*, and would just as clearly prohibit *promotional* advertising by *licensed* pharmacists, but is unclear about the other two possibilities: *informational* advertising by *licensed* pharmacists or *promotional* advertising by *nonlicentiates*.

It is well settled that criminal statutes in the First Amendment area are limited to a very narrow range of permissible vagueness. *Smith v. California*, 361 U.S. 147, 151 (1959); *Winters v. New York*, 333 U.S. 507, 509 (1948); *Herndon v. Lowry*, 301 U.S. 242, 258 (1937); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931). The statutory language in combination with the defendants' inconsistent attempts to elucidate the scope of the statute render this legislation unconstitutionally vague.

Defendants' final reading of the statute to permit informational price advertising by groups such as plaintiff San Francisco Consumer Action is grammat-

ically tortured[22] and simply not sustainable by the statutory language.[23] Additionally, it is difficult to imagine exactly how the distinction between promotional and informational advertising would be defined for purposes of the concession.

Furthermore, given the radical turnabout of defendants during the course of this litigation, it is unreasonable to expect plaintiffs to rely at their peril on the most recently enunciated position of the board. Future members might not consider themselves bound by the present members' concessions and might apply the statute against plaintiffs in accord with the plain language of the statute. Defendants' dramatic change of position is itself evidence of the vagueness of the statute. If even the persons charged with enforcement of the statute cannot tell for sure to whom the pro-

---

[22]The defendants' conclusion, that the statute only prohibits "promotional" or "commercial" advertising in connection with the profession of pharmacy, requires that the prepositional phrase "When those commodities or services are furnished in connection with the professional practice or business for which he is licensed," be read to modify the words "advertise" or "representations," rather than the words "commodities" or "services," the nouns immediately preceding the phrase which are directly referred to within the pharse itself as the antecedent subjects. The structure of the sentence indicates that the prohibition extends to "representations in any form" so long as they refer to the price of the commodity (here prescription drugs), when that *commodity* is "furnished in connection with the professional practice" of the licensed pharmacist. The grammatical structure will not support defendants' limitation of the prohibition to "promotional advertising."

[23]The defendants' attempt to moot the case by applying the statute not to apply to publications by plaintiffs such as San Francisco Consumer Action is not sustainable by the statutory language, which reads that "[n]o person, whether or not licensed . . ., shall advertise or cause or permit to be advertised, any representations. . . ." The language clearly was intended by the legislature to prevent advertising by *any persons*.

hibitions apply and what conduct is proscribed, the statute is certainly one which, "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.[24]

Accordingly, this court holds that Section 651.3 is unconstitutionally vague in violation of the due process clause of the Fourteenth Amendment.

Defendants contend that this case is controlled by *Head v. New Mexico Board of Examiners,* 374 U.S. 424 (1963),[25] *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935), and *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955). These cases upheld certain state regulations of the advertising of professional services. They are distinguishable from the present case in which the California statutes prohibit the advertisement of the price of a commodity, a specific item prescribed and identified by a physician. The pharmacist does nothing more than provide exactly what the doctor ordered. While the pharmacist's function is very important and attendant with great responsibility and risk, it is more akin to the provision of a product than the rendering of a service, which is commonly thought of as involving greater flexibility and discretion on the part of the provider. Accordingly, the Supreme Court cases cited, *supra,* do not dissuade this court from its conclusion on the First Amendment and Due Process issues. See *Virginia Citizens Consumer Council v. State Board of Pharmacy, supra,* 373 F.Supp. at 686.

[24] *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).

[25] The First Amendment issue was not even considered by the court in *Head, supra,* since it was not made to the state courts or reserved in the notice of appeal to the Supreme Court. 374 U.S. at 432, n.12.

IV. SECTION 651—FIRST AMENDMENT

Plaintiffs also challenge Section 651 of the Business and Professions Code as unconstitutional in two respects: first, that it violates plaintiffs' First Amendment rights by totally preventing them from knowing that a pharmacy offers drugs at a discount and second, that it is unconstitutionally vague in that it proscribes the selling of drugs at a "discount," a term alleged to be so vague as to deny due process.

Section 651 reads:

> It is unlawful for any person licensed (a) under this division, except a person licensed under Chapter 7.5 (commencing with Section 3300); or (b) under any initiative act referred to in this division to offer for sale or to sell any commodity or to offer to render or to render any service under the representation that the price or fee which is to be, or is, charged for such commodity or service, or both, is at a discount, or under the representation that the price or fee which is to be, or is charged for such commodity or service, or both, is at a percentage or otherwise less than the average fee or price then regularly charged under like conditions by the person so licensed or by other persons for such commodity or service or commodity and service. The provisions of this section shall not be construed to modify or establish prices or fees or to modify or affect in any manner any other provision of this division. Any person licensed under Chapter 7.5 (commencing

with Section 3300) of this division who offers for sale or sells any commodity or offers to render or renders any service under the representation that the price or fee for such commodity or service is at a discount or that at a percentage or otherwise less than the average price or fee then regularly charged under like conditions by the person so licensed or by other persons shall include in such representation a statement of the average price or fee then regularly charged by the person so licensed or by other persons.

The provisions of this section pertaining to persons licensed under Chapter 7.5 (commencing with Section 3300) of this division shall not apply to the sale of any ophthalmic materials.[26]

Section 651 has been held not to prohibit the actual giving of discounts, but only to prohibit the representation that the price is a discount one. *Cozad v. Board of Chiropractic Examiners*, 153 Cal.App.2d 249, 259, 314 P.2d 500, 506 (2nd Dist. 1957).

This court is of the opinion that Section 651 violates plaintiffs' First Amendment rights for essentially the same reasons that invalidated Section 651.3. The receipt of information that a pharmacy offers prescription drugs at a discount price to certain classes of consumers could enable certain of the low-income plaintiffs to purchase drugs at that particular pharmacy in circumstances where they could not afford, and would not be able to purchase, the same drug at a pharmacy not offering the lower price.

[26] California Business and Professions Code § 652.5 makes violation of § 651 a misdemeanor. See note 1, *supra*.

While the statute as construed by the California courts would apparently permit pharmacists actually to sell drugs at a discount to senior citizens, the chronically ill, or some other class of high volume users, it does not permit pharmacists to represent to anyone that the price is at a discount. Since no one would purchase without knowledge of the discount, the practical effect of banning representation of a discount is the same as banning the discount itself. Given the importance to plaintiffs of the information suppressed by Section 651, the statute must fall as violative of the First Amendment.

V. SECTION 651—DUE PROCESS—VAGUENESS

While this court would be inclined to find Section 651 also violative of due process in that the term "discount" is impermissibly vague, the present plaintiffs do not appear to have standing to assert this constitutional violation. Unlike Section 651.3, which prohibits violations by any person, Section 651 applies only to licensees in the healing arts. None of the named plaintiffs or plaintiffs in intervention purport to be a licensee subject to prosecution under the allegedly vague statute. In *Patterson Drug Company v. Kingery*, 305 F.Supp. 821 (W.D.Va. 1969) (three-judge court), where a Virginia statute almost identical to Section 651 was found to be unconstitutionally vague, the plaintiffs were a drug company and a pharmacist in charge of one of the branch drug stores. Defendants argue that plaintiffs lack standing to object to the vagueness of the statute, because, unlike the

plaintiffs in *Patterson Drug*, they are not subject to prosecution for violation of the statute. Since we have already found the statute violative of the First Amendment, we need not and do not express any opinion on the standing issue, and do not reach the merits of the vagueness attack on Section 651.

VI. ANTITRUST

Plaintiffs also argue that the statutes maintain and perpetuate an anticompetitive market for prescription drugs in California in violation of the federal antitrust laws and the supremacy and commerce clauses of the United States Constitution. This argument raises troublesome issues concerning possible state exemptions from federal antitrust prohibitions. *See, e.g., State of New Mexico v. American Petrofina, Inc. et al.*, 501 F.2d 363 (9th Cir. 1974), *noted*, 88 Harv. L. Rev. 1021 (1975). In light of this court's disposition of the First Amendment and Due Process attacks, we need not reach the antitrust issue.

CONCLUSION

We conclude that the plaintiffs and intervenors are entitled to declaratory and injunctive relief permanently enjoining defendant Board from enforcing California Business and Professions Code Sections 651, 651.3 and 652.5 insofar as they prohibit advertising of the retail price of prescription drugs or advertising of the fact that a quoted price is at a discount.

/s/ James R. Browning
James R. Browning
United States Circuit Judge

William G. East
Senior United States District Judge

/s/ Robert F. Peckham
Robert F. Peckham
United States District Judge

CETIFICATE

I certify that Judge East concurs in the foregoing and make this certification because of his absence from the district.

/s/ Robert F. Peckham
Robert F. Peckham
United States District Judge

Appendix "B"

In the United States District Court
Northern District of California

No. C-74-1091 RFP (SJ)

Shirley Terry, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

California State Board of Pharmacy, William E. McDermont, Jr., James R. Gates, Denver C. Latimer, Roscoe C. Carroll, Charles V. Cummins, David H. Garfield, Kenneth G. Gonsalves, and Carl L. Vitalie, as members of the State Board of Pharmacy,

Defendants,

Ellen Stern Harris; The California Newspaper Publishers Association, a California nonprofit corporation; The California Broadcasters Association, a California nonprofit corporation; The Los Angeles County Health Rights Organization, an unincorporated nonprofit association; Committee for the Rights of the Disabled, a California nonprofit corporation; The San Francisco Consumer Action Council, a California nonprofit corporation; The California Legislative Council for Older Americans, an unincorporated nonprofit association; The Blind and Disabled Action Committee of California, an unincorporated nonprofit association,

Plaintiffs in Intervention.

[Filed May 12, 1975]

JUDGMENT

Before: BROWNING, Circuit Judge, EAST, Senior District Judge, and PECKHAM, District Judge

For the reasons set forth in the opinion of even date filed herewith, It Is Hereby Ordered, Adjudged and Decreed that the California State Board of Pharmacy is permanently enjoined from enforcing California Business and Professions Code Sections 651, 651.3 and 652.5 insofar as they prohibit advertising of the retail price of prescription drugs or advertising of the fact that a quoted price is at a discount.

/s/ James R. Browning
James R. Browning
United States Circuit Judge

William G. East
Senior United States District Judge

/s/ Robert F. Peckham
Robert F. Peckham
United States District Judge

CERTIFICATE

I certify that Judge East concurs in the foregoing and make this certification because of his absence from the district.

/s/ Robert F. Peckham
Robert F. Peckham
United States District Judge

Appendix "C"

United States District Court
Northern District of California

No. C-74-1091 RFP (SJ)

Shirley Terry, et al.,
Plaintiffs,
vs.
California State Board of Pharmacy, et al.,
Defendants.

Ellen Stern Harris, et al.,
Plaintiffs in Intervention.

[Filed July 10, 1975]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the California State Board of Pharmacy, William E. McDermott, Jr., James R. Gates, Denver C. Latimer, Roscoe C. Carroll, Charles V. Cummins, David H. Garfield, Kenneth G. Gonsalves, and Carl L. Vitalie, as members of the State Board of Pharmacy, defendants herein, do hereby appeal to the Supreme Court of the United States from the order of declaratory and injunctive relief of a three-judge District Court entered in this action on May 13, 1975, which permanently enjoined

defendant Board of Pharmacy from enforcing California Business and Professions Code Sections 651, 651.3 and 652.5 insofar as they prohibit advertising of the retail price of prescription drugs or advertising of the fact that a quoted price is at a discount.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: July 10, 1975.

Downey, Brand, Seymour & Rohwer
By /s/ John F. Downey
John F. Downey
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify, pursuant to the rules of the Supreme Court of the United States, as amended, that I am a member of the Bar of the Supreme Court of the United States and on this 10th day of July, 1975, copies of the foregoing Notice of Appeal were deposited in a United States Post Office with first class postage prepaid, addressed to counsel of record for the plaintiffs and plaintiffs in intervention at their post office addresses as follows:

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I further certify that all parties required to be served have been served.

/s/ John F. Downey
John F. Downey

Supreme Court, U. S.
FILED
OCT 1 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-336

CALIFORNIA STATE BOARD OF PHARMACY, et al.,
Appellants,

vs.

SHIRLEY TERRY, individually and on behalf of all others similarly situated, Plaintiff, and ELLEN STERN HARRIS, et al.,
Plaintiffs in Intervention,
Appellees.

Appeal from the United States District Court
for the Northern District of California

Motion to Affirm

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In the

Supreme Court of the United States

October Term, 1975

No. 75-336

California State Board of Pharmacy, et al.,
Appellants,

vs.

Shirley Terry, individually and on behalf of all others similarly situated, Plaintiff, and Ellen Stern Harris, et al.,
Plaintiffs in Intervention,
Appellees.

Appeal from the United States District Court
for the Northern District of California

Motion to Affirm

Appellees, pursuant to Rule 16(1)(c) and (d) of the Rules of the Supreme Court of the United States, move that the final judgment and order of the District Court be affirmed on the ground that the decision of the District Court is so obviously correct under the principles established by this Court in *Bigelow v. Commonwealth of Virginia,* ..... U.S. ....., 95 S.Ct. 2222 (1975) as to warrant no further review by this Court.

OPINION BELOW

The opinion of the District Court is reported at 395 F. Supp. 94, and is set forth, together with the Court's judgment, in Appendices A and B of Appellants' Jurisdictional Statement.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellants' Jurisdictional Statement.

QUESTION PRESENTED

Does a statutory scheme, which makes it unlawful to advertise the price of prescription drugs or the fact that prescription drugs are being sold at a discount and which the court below found only minimally advanced any state interest and which failed to advance those interests by the least burdensome means, violate Appellees' First Amendment right to receive health-vital information.*

STATEMENT OF THE CASE

Appellees disagree with Appellants' statement of the case in the following particulars:

Appellants' claim on page 8 that ". . . the lower court was not called upon to resolve any factual issues" is incorrect. Although some background facts were settled by a stipulation of the parties dated December 11, 1974 (CT 119-25), the remainder of the factual issues were presented to the court for final decision upon the affidavits and exhibits submitted. In fact, a stipulation was filed by the

*The instant case also raises a number of questions which Appellees believe are not necessary for consideration on a motion to affirm in light of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, No. 74-895, *prob. juris noted*, ... U.S. ....., 95 S.Ct. 1389 (March 17, 1975). For example, Appellees have alleged that the statutory scheme is void under the Supremacy Clause because it conflicts with the antitrust laws of the United States, that the statutes in question are unconstitutionally vague and that they abridge Appellees' right to publish health-vital information.

parties on January 8, 1975 (CT 397) agreeing that the court could, without objection as to form, consider all of the affidavits and exhibits in arriving at its decision on the merits. As seen in the opinion below, the lower court did undertake this resolution of the many disputed factual issues. See *e.g.*, 395 F.Supp. at 104, 105.

Appellants' similar claim on pages 8 and 9 of their Jurisdictional Statement, that the lower court "failed to appreciate" certain of their assertions is also incorrect. The District Court's opinion clearly demonstrates that all of these allegations were carefully considered, but were rejected on the facts presented. As will be discussed more fully below, Appellants appear to equate the lower court's unfavorable decision on the facts with a supposed failure to consider these facts.

STATUTES INVOLVED

The applicable provisions of the California Business and Professions Code are set forth in Appellants' Jurisdictional Statement at pp. 3-7. All references herein are to said Code unless otherwise noted.

ARGUMENT

Last Term this Court, in *Bigelow v. Commonwealth of Virginia*, ... U.S. ....., 95 S.Ct. 2222 (1975), laid to rest any lingering doubts that "commercial speech," such as advertising, might be totally outside the ambit of First Amendment protection. Putting an end to the rigid "commercial" versus "non-commercial" legacy of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), this Court concluded:

> "The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the ad-

> vertisement involved sales or 'solicitations,' [citations omitted] . . . or because appellant's motive or the motive of the advertiser may have involved financial gain [citations omitted]." 95 S.Ct. at 2231.

Bigelow teaches that the task of courts, when confronted with First Amendment issues arising in a commercial context, is to carefully balance the First Amendment interests asserted against the regulatory interests advanced by the state. 95 S.Ct. at 2234-2235.

This is exactly what the lower court in the present case did. It weighed the importance of competitive prescription drug price advertising (with its resultant lower prices and greater availability of information to the consuming public) against the alleged evils sought to be avoided by the statutory ban. As will be discussed, its decision was correct on the record and requires no full review by this Court.

The opinion below, although penned slightly before the *Bigelow* decision, analyzed the evidence under both the "commercial versus non-commercial" test, and under the "balance of interests" approach found in *Bigelow*. Under the former test, the court concluded that the speech was not commercial within the meaning of *Valentine*. 395 F.Supp. at 98-102. Under the latter approach, the court concluded that the dissemination of prescription drug price information through advertising was of great benefit to Appellees and that the alleged harm resulting from such advertisements was, at best, unconvincing and unproven. 395 F.Supp. at 102-106.

First, there is little question from the record that the information sought by Appellees is vital, and sometimes life-essential, to the consuming public,[1] and that the retail

1. Stipulation of Facts filed December 11, 1974 (CT 121, 125) at ¶¶ 1, 17.

price for such required drugs necessarily must come down in a competitive market.[2]

Secondly, the fact that prescription drug price information is obtainable from pharmacies via a visit or telephone call, does not diminish the Appellees' right to receive this information in the manner desired. *Schneider v. Irvington*, 308 U.S. 147, 163 (1939); *accord, Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Pell v. Procunier*, 417 U.S. 817 (1974). Even if this availability of other sources of information were constitutionally relevant, the lower court specifically found from the evidence presented, that these other sources are more burdensome and less effective than information conveyed through the advertising medium. 395 F.Supp. at 104.

Thirdly, and most importantly, there is dearth of evidence to support Appellants' claims, made at length in their Jurisdictional Statement, regarding "artificial demand" and other evils which allegedly result from price advertising. All three judges below, upon examination of the evidence in full, found little or no support for any of Appellants' claims in this regard. 395 F.Supp. at 105.

Appellants now seek to overcome this evidentiary vacuum by making broad and unsupported assertions to this Court, such as: ". . . [I]t would be naive indeed to suggest that sales of certain of these drugs could not be stimulated by advertising them at cut rates. . . ." (Jurisdictional Statement, p. 10); and "Who would doubt that prescription birth control pills are frequently passed around to numerous users so that an advertisement announcing a big discount on one such drug could promote sales substantially." (Jurisdictional Statement, p. 11); and "That price and discount

2. See Exhibit 1 & 2 to plaintiffs' Opening Memorandum of Points & Authorities filed Dec. 13, 1974 (CT 167-77) and Supplemental Affidavit filed Jan. 13, 1975 (CT 399-418) and authorities cited therein.

advertising of prescription drugs can, and undoubtedly will, produce an artificial and unhealthy demand for certain of these drugs is therefore simply a fact of life." (Jurisdictional Statement, p. 11).

The "simple fact of life" is that the record herein provides no substantial evidentiary basis for any of these sweeping assertions. Appellants are, in reality, asking this Court to ignore the record and the lower court's findings and now assume facts which were not proved below. This obviously is not the function of this Court. F.R.Civ.P. 52(a); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

In the same vein, Appellants' fears about the use of "loss leader" sales tactics and other hypothetical means of generating this alleged "artificial demand" do not square with the facts of this case, or with reason. There is no way a pharmacist can sell more prescription drugs to a patient, once he is "lured" into the pharmacy, without a new prescription from a doctor. If this were not so, the very price lists posted by pharmacists on their premises pursuant to § 4333 would also create this same "artificial demand."

The central fact and fatal flaw in all of Appellants' arguments about "artificial demand" is that it assumes the availability of physicians who can be pressured into prescribing unneeded medications. Appellants' attempts to support this assumption were found unpersuasive by the court. 395 F.Supp. at 105.

Further, assuming *arguendo* Appellants had adequately supported their assertion that knowledge of prescription drug prices leads to increased pressure upon physicians, and further assuming some physicians could not resist such patient pressure, the appropriate state response is to enforce those provisions such as § 2361.5 which prohibit pre-

scribing unnecessary medications.[3] The answer is *not* to conceal knowledge of drug prices from the public, and thereby foster a non-competitive market in which patients are unaware of the best buy for their required medications.

Appellants' reliance upon the due process cases such as *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935) and *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955) is inapposite. In the present case we are concerned with First Amendment rights of patient-consumers and the limits of state regulation of these rights. As noted in *Bigelow, supra,* at footnote 10, these due process cases are in no way inconsistent with the present First Amendment analysis. To affirm the lower court's decision in no way requires the overruling of these cases, as suggested by Appellants.

Appellants' concern over the prevalent use and abuse of drugs in today's world is well taken. However, to suggest that drug abuse has been fostered by price advertising is wrong. At present, 23 states[4] permit the advertising of prescription drug prices. Appellants have produced no evidence whatever of increased drug use through over-prescribing in these states. None of the other evils envisioned

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3. Under basic constitutional principles, the state is obligated to pursue its objectives in a manner least offensive to citizens' constitutional rights. Dunn v. Blumstein, 405 U.S. 330 (1972); Shelton v. Tucker, 364 U.S. 479 (1960). As stated by the lower court:

> "Each asserted state interest can be more directly protected without restricting access to information on prescription drug prices." 395 F.Supp. at 106.

The fostering of a non-competitive market by the statutory scheme with its resultant higher prices to patients, is an extraordinarily indirect approach to possible over-prescribing by physicians.

4. Note, "Retail Drug Advertising Bans Are Bad Medicine For Consumers—Is There a Sherman Act Prescription?" 15 Ariz.L.Rev. 117 (1973).

by Appellants have been shown to occur in these states. The problems voiced by Appellants are simply not the result of the public's awareness of the price of prescription drugs. Viewed in light of the paramount importance of Appellees' First Amendment rights, these general problems of drug abuse in no way support the infringement upon free speech and press sought herein by Appellants.

CONCLUSION

Wherefore, Appellees respectfully submit that the questions upon which this appeal was taken are so unsubstantial that further argument is not warranted. Appellees therefore respectfully move the Court to affirm the judgment entered in this cause by the District Court for the Northern District of California.

DATED: September 23, 1975.

San Francisco, California

Respectfully submitted,

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